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# Watergate, Multiple Conspiracies, and the White House Tapes

*Arnold Rochvarg\**

On January 1, 1975, John Mitchell, former United States Attorney General, John Ehrlichman, former Chief White House Assistant for Domestic Affairs, H.R. Haldeman, former White House Chief of Staff, and Robert Mardian, former Assistant Attorney General, were convicted of conspiracy<sup>1</sup> for their involvement in what is generally known as “Watergate.”<sup>2</sup> The Watergate conspiracy trial, presided over by Judge John Sirica, had run from October 1, 1974 until December 27, 1974.<sup>3</sup> The trial included the in-court testimony of most of the figures involved in the Watergate scandal,<sup>4</sup> and the playing of thirty of the “White House tapes.”<sup>5</sup> The purpose of this Symposium article is to discuss whether the evidence presented at the Watergate trial is better understood as evidence of multiple conspiracies, as argued by two of the defendants,<sup>6</sup> or as a single conspiracy as argued by the prosecution. The article first will set forth the law on multiple conspiracies and apply that law to the evidence presented at the Watergate conspiracy trial. The article will then discuss whether the admission into evidence of certain White House tapes premised on the single conspiracy view may have prejudiced any of the convicted defendants.

## I. THE LAW OF MULTIPLE CONSPIRACIES

It is not uncommon at a criminal conspiracy trial, or on appeal from a conviction of conspiracy, for a defendant to argue that a guilty verdict for

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\* Professor, University of Baltimore School of Law. Professor Rochvarg was a member of the legal defense team that represented Robert Mardian in the appeal of his conviction of conspiracy at the Watergate conspiracy trial. Mardian’s conviction was reversed. *United States v. Mardian*, 546 F.2d 973 (D.C. Cir. 1976).

<sup>1</sup> 18 U.S.C. § 371 (2006).

<sup>2</sup> *United States v. Haldeman*, 559 F.2d 31, 54 (D.C. Cir. 1976), *cert. denied sub nom.*, *Ehrlichman v. United States*, 431 U.S. 933 (1977). Mitchell, Ehrlichman and Haldeman were also convicted of various substantive offenses such as obstruction of justice, perjury, and false declarations before a grand jury or court. *Haldeman*, 559 F.2d at 54.

<sup>3</sup> *Haldeman*, 559 F.2d at 130 n.284.

<sup>4</sup> *Id.* at 51. The most notable exceptions were former President Nixon and Gordon Liddy, neither of whom testified. *Id.*

<sup>5</sup> *Id.* at 108.

<sup>6</sup> Both Mitchell, *Haldeman*, 559 F.2d at 91–92, and Mardian, *Mardian*, 546 F.2d at 975, raised multiple conspiracy arguments on appeal.

the conspiracy charged in the indictment is inappropriate because the evidence at trial established that there were several separate conspiracies.<sup>7</sup> Criminal indictments typically charge a group of defendants with being conspirators in a single conspiracy.<sup>8</sup> From the prosecution's perspective, a single conspiracy charge is advantageous because it permits acts and statements of any of the defendants to be used against the other defendants. Defendants usually argue for multiple conspiracies to avoid having the acts and statements of others being admitted against them, as well as to demand severance to obtain a separate trial.<sup>9</sup> This section of the article will discuss the various approaches courts have taken when deciding whether evidence establishes a single conspiracy or multiple conspiracies.

#### A. Chain or Hub and Spoke Conspiracies

Some courts, when discussing the multiple conspiracy issue, focus on whether the conspiracy is a "chain" or a "hub and spoke" conspiracy.<sup>10</sup> A chain conspiracy is treated as a single conspiracy, while a hub and spoke conspiracy is treated as proof of multiple conspiracies.<sup>11</sup>

The classic case involving hub and spoke conspiracies is *Kotteakos v. United States*,<sup>12</sup> a 1946 opinion from the United States Supreme Court. The criminal scheme in *Kotteakos* involved the procurement of fraudulent loans to defraud the Federal Housing Administration.<sup>13</sup> Simon Brown was the "common and key" figure in all of the fraudulent loans.<sup>14</sup> Brown agreed with thirty-six persons to fraudulently procure loans for a five percent commission.<sup>15</sup> The multiple conspiracy issue presented was whether the various persons for whom Brown procured loans were all conspirators in one conspiracy along with Brown.<sup>16</sup> The Court viewed the defendants other than Brown as spokes emanating from the center hub (Brown) who were all independent of each other.<sup>17</sup> The proof at trial "made out a case, not of a single conspiracy, but of several, notwithstanding, only one was charged in the indictment."<sup>18</sup>

The hub and spoke analogy has been discussed by many courts in conspiracy prosecutions involving several criminal schemes.<sup>19</sup> It is a

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7 Herbert Wechsler, et al., *The Treatment of Inchoate Crimes in the Modern Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy*, 61 COLUM. L. REV. 957, 980 (1961).

8 *United States v. Townsend*, 924 F.2d 1385, 1389–90 (7th Cir. 1991).

9 *Kotteakos v. United States*, 328 U.S. 750 (1946).

10 *United States v. Chandler*, 388 F.3d 796, 807 (11th Cir. 2004).

11 *United States v. Swafford*, 512 F.3d 833, 842 n.3 (6th Cir.), *cert. denied*, 555 U.S. 936 (2008).

12 *Kotteakos*, at 754–55.

13 *Id.* at 752.

14 *Id.* at 753.

15 *Id.*

16 *Id.* at 758.

17 *Id.* at 754–55.

18 *Id.* at 755.

19 *See, e.g., In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 327 (3d Cir. 2010); *United States v. Chandler*, 388 F.3d 796, 807 (11th Cir. 2004).

popular argument in wide-ranging drug conspiracies,<sup>20</sup> as well as in conspiracy cases involving a small number of defendants in non-drug cases.<sup>21</sup> For example, a hub and spoke conspiracy was found in *United States v. McDermott*,<sup>22</sup> which involved an investment banker who was having an affair with an adult film star. As part of his affair, McDermott passed on insider financial information to his paramour.<sup>23</sup> Unknown to McDermott, the film actress was having an affair with another man, and during that affair, she passed on the insider information to him.<sup>24</sup> Together they made profits of over \$170,000 in stock trades.<sup>25</sup> The Second Circuit reversed McDermott's conviction of a single conspiracy involving all three persons.<sup>26</sup> In this case, the adult film actress was the hub and the two men were the spokes with no conspiratorial relationship.

To be contrasted with hub and spoke conspiracies is the single chain conspiracy. In the single chain conspiracy, each defendant is viewed as linked to every other defendant despite the lack of direct communication or contact with each other.<sup>27</sup> Most chain conspiracy cases involve the production, distribution, and sale of illegal drugs.<sup>28</sup> For example, *United States v. Bruno*<sup>29</sup> held that smugglers, middlemen, and sellers of narcotics were all members of one conspiracy under the chain conspiracy approach, despite the lack of evidence of any cooperation or communication between the smugglers and any sellers or between the different sellers in different states.<sup>30</sup>

#### B. The Agreement

Some courts, when discussing the multiple conspiracy issue, focus on the agreement among the defendants.<sup>31</sup> The classic case here is *Braverman v. United States*,<sup>32</sup> which involved a conspiracy to violate federal tax laws.<sup>33</sup> The United States Supreme Court held that the "precise nature and

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<sup>20</sup> See, e.g., *United States v. Swafford*, 512 F.3d 833 (6th Cir.), *cert. denied*, 555 U.S. 936 (2008); *United States v. Caldwell*, 589 F.3d 1323 (10th Cir. 2008); *United States v. Mathis*, 216 F.3d 18 (D.C. Cir.), *cert. denied*, 531 U.S. 972 (2000).

<sup>21</sup> See, e.g., *United States v. Kemp*, 500 F.3d 257 (3d Cir. 2007), *cert. denied*, 552 U.S. 1223 (2008); *United States v. Chandler*, 388 F.3d 796 (11th Cir. 2004).

<sup>22</sup> *United States v. McDermott*, 245 F.3d 133 (2d. Cir. 2001).

<sup>23</sup> *Id.* at 138.

<sup>24</sup> *Id.* at 136.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 142.

<sup>27</sup> *United States v. Robinson*, 547 F.3d 632, 641 (6th Cir. 2008).

<sup>28</sup> *Id.*

<sup>29</sup> *United States v. Bruno*, 105 F.2d 921 (2d Cir. 1939), *rev'd on other grounds*, 308 U.S. 287 (1939).

<sup>30</sup> *Id.* at 922.

<sup>31</sup> See, e.g., *United States v. Trainor*, 477 F.3d 24 (1st Cir. 2007); United States Court of Appeals for the Third Circuit Pattern Jury Instructions § 6.18.371H (2010).

<sup>32</sup> *Braverman v. United States*, 317 U.S. 49 (1942).

<sup>33</sup> *Id.* at 50.

extent of the conspiracy must be determined by reference to the agreement which embraces and defines its objects.”<sup>34</sup>

It is possible for various persons to be parties to a single agreement, and thus co-conspirators in a single conspiracy, even though they do not know the identity of the other members of the conspiracy or are unaware of the acts of the others.<sup>35</sup> Nor does a single conspiracy become multiple conspiracies because members drop out or are added.<sup>36</sup> A defendant can be part of a single conspiracy even if that defendant played only a small part during a short time period of that conspiracy.<sup>37</sup> Additionally, just because there are different subgroups operating in different places, it does not mean that there is more than one conspiracy.<sup>38</sup> In all of these circumstances, as long as there is a single agreement to which all defendants agreed, there is one conspiracy of which all defendants are guilty.<sup>39</sup>

### C. Common Goal or Purpose

Another approach to the multiple conspiracy issue focuses on whether the defendants charged with conspiracy had a common goal or purpose. In *Blumenthal v. United States*,<sup>40</sup> the Supreme Court found a single conspiracy to acquire and sell whiskey at higher-than-authorized prices even though there were several agreements because all the defendants “sought a common end.”<sup>41</sup> The multiple agreements were viewed not as proving different conspiracies, but rather as “essential and integral steps” towards a common goal.<sup>42</sup> Courts typically define the “common goal” element of a single conspiracy broadly. For example, in *United States v. Moore*,<sup>43</sup> several correctional officers were found guilty of a single conspiracy for engaging in sexual relations with female inmates.<sup>44</sup> The defendants argued that a single conspiracy did not exist because there were separate agreements among different defendants to engage in sex with different inmates.<sup>45</sup> The Eleventh Circuit rejected this multiple conspiracy argument, holding that the officers “had the common goal of trading sex with inmates for contraband.”<sup>46</sup> Elaborate drug conspiracy convictions have been viewed as a single conspiracy despite the possible existence of separate agreements. Courts have found a single conspiracy based on

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<sup>34</sup> *Id.* at 53.

<sup>35</sup> *See, e.g.*, *Kilgore v. State*, 305 S.E.2d 82, 90 (Ga. 1983).

<sup>36</sup> *United States v. Portela*, 167 F.3d 687, 699 (1st Cir.), *cert. denied*, 528 U.S. 917 (1999).

<sup>37</sup> *United States v. Padilla*, 982 F.2d 110, 115 (3d Cir. 1992).

<sup>38</sup> *United States v. DiPasquale*, 561 F. Supp. 1338, 1357 (E.D. Pa. 1983).

<sup>39</sup> *Id.*

<sup>40</sup> *Blumenthal v. United States*, 332 U.S. 539 (1947).

<sup>41</sup> *Id.* at 559.

<sup>42</sup> *Id.*

<sup>43</sup> *United States v. Moore*, 525 F.3d 1033 (11th Cir. 2008).

<sup>44</sup> *Id.* at 1038–39.

<sup>45</sup> *Id.* at 1041–42.

<sup>46</sup> *Id.* at 1043.

common goals of selling speed,<sup>47</sup> trafficking cocaine,<sup>48</sup> stealing money from a union,<sup>49</sup> and defrauding the federal government.<sup>50</sup>

When discussing the common purpose aspect of single or multiple conspiracies, courts also consider whether the conspiracies were acting at cross-purposes with each other.<sup>51</sup> For example, in *United States v. Camiel*,<sup>52</sup> multiple conspiracies were found, contrary to the single conspiracy charged in the indictment, when the alleged single conspiracy consisted of two antagonistic factions.<sup>53</sup>

## II. WATERGATE TRIAL EVIDENCE OF DIFFERENT CONSPIRACIES

The evidence presented during the Watergate conspiracy trial could be viewed as supporting four different conspiracies: (1) the Ellsberg Break-In Conspiracy; (2) the Watergate Break-In Conspiracy; (3) the Cover-Up Conspiracy; and (4) the White House Conspiracy.

### A. The Ellsberg Break-In Conspiracy

Daniel Ellsberg was a military analyst who worked at the RAND Corporation after serving at the Pentagon under Secretary of Defense Robert McNamara.<sup>54</sup> Because of his high-level security clearance, Ellsberg gained access to a group of highly classified documents regarding the Vietnam War, which became known as the “Pentagon Papers.”<sup>55</sup> These documents demonstrated that the American public and Congress had been deceived about many aspects of the Vietnam War.<sup>56</sup> Ellsberg secretly made copies of these documents and provided them to *The New York Times* which, in June, 1971, published excerpts and commentary.<sup>57</sup> Ellsberg also provided copies to *The Washington Post* and other newspapers.<sup>58</sup>

The Nixon administration was very concerned about the publication of these Vietnam War documents.<sup>59</sup> Attorney General Mitchell ordered *The*

<sup>47</sup> See, e.g., *United States v. Kelly*, 892 F.2d 255, 259 (3d Cir. 1989), *cert. denied*, 487 U.S. 1006 (1990).

<sup>48</sup> See, e.g., *United States v. Richardson*, 532 F.3d 1279, 1285 (11th Cir. 2008), *cert. denied*, 555 U.S. 1120 (2009); *United States v. Portela*, 167 F.3d 687, 695–99 (1st Cir.), *cert. denied*, 528 U.S. 917 (1999).

<sup>49</sup> *United States v. Hemphill*, 514 F.3d 1350, 1362–63 (D.C. Cir.), *cert. denied*, 555 U.S. 1020 (2008).

<sup>50</sup> *United States v. Huff*, 609 F.3d 1240, 1244 (11th Cir. 2010).

<sup>51</sup> *Kelly*, 892 F.2d at 260.

<sup>52</sup> *United States v. Camiel*, 689 F.2d 31 (3d Cir. 1982).

<sup>53</sup> *Id.* at 36.

<sup>54</sup> *F.B.I. Continues Investigation of How Times Got Documents*, N.Y. TIMES, June 18, 1971, at 15 [hereinafter *F.B.I. Investigation*].

<sup>55</sup> *The Covert War*, N.Y. TIMES, June 13, 1971, at 38.

<sup>56</sup> Neil Sheehan, *Vietnam Archive: Pentagon Study Traces 3 Decades of Growing U.S. Involvement*, N.Y. TIMES, June 13, 1971, at 1.

<sup>57</sup> *Id.*; *F.B.I. Investigation*, *supra* note 54, at 15.

<sup>58</sup> Chalmers M. Roberts, *Documents Reveal U.S. Effort in '54 to Delay Viet Election*, WASH. POST, June 18, 1971, at A1.

<sup>59</sup> Max Frankel, *Court Step Likely, Return of Documents Asked in Telegram to Publisher*, N.Y.

*New York Times* to cease publication of the leaked information.<sup>60</sup> When the newspaper refused, the government sued to restrain publication.<sup>61</sup> Most significant to Watergate, in response to the Ellsberg leaks, a group known as the “Plumbers” was organized inside the White House under the supervision of John Ehrlichman to deal with national security leaks.<sup>62</sup>

One of the projects of the Plumbers was to discredit Daniel Ellsberg.<sup>63</sup> A plan was devised to break into the offices of Ellsberg’s psychiatrist, Dr. Lewis Fielding, to obtain medical records on Ellsberg which the White House hoped would destroy Ellsberg’s credibility.<sup>64</sup> Ehrlichman approved this covert operation after receiving assurances that it could not be traced back to the White House.<sup>65</sup> On September 3, 1971, a group including Gordon Liddy, Howard Hunt, and Bernard Barker burglarized Dr. Fielding’s medical office—nothing on Ellsberg was found.<sup>66</sup>

The public did not learn of the Plumber’s’ break-in until April of 1973 when, during the criminal trial of Ellsberg for violating the Espionage Act of 1917, information about the Plumbers’ burglary was revealed.<sup>67</sup> This revelation, along with revelations that the government had engaged in illegal wiretapping of Ellsberg, and that the presiding judge, William Matthew Byrne, Jr., had been offered the directorship of the FBI by John Ehrlichman, led to the dismissal of all charges against Ellsberg.<sup>68</sup>

More than three full days at the Watergate conspiracy trial were devoted to evidence involving the White House Plumbers’ break-in of Ellsberg’s psychiatrist’s office.<sup>69</sup> Although this evidence was most relevant to John Ehrlichman, the prosecution’s position at the Watergate trial was that it was “admissible against all [defendants] even though only Ehrlichman had been personally involved in the actual authorization.”<sup>70</sup> The prosecution argued that the burglary of Ellsberg’s psychiatrist’s office established a motive for the Watergate conspiracy charged in the indictment.<sup>71</sup> Some of the same persons who participated in the Ellsberg

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TIMES, June 15, 1971, at 1.

<sup>60</sup> *Id.*

<sup>61</sup> Fred P. Graham, *Argument Friday, Court Here Refuses to Order Return of Documents Now*, N.Y. TIMES, June 16, 1971, at 1; *Texts of Government Papers in Complaint Against the Times and Judge’s Order*, N.Y. TIMES, June 16, 1971, at 18.

<sup>62</sup> Earl Krogh, *The Break-In That History Forgot*, N.Y. TIMES, June 30, 2007, at A17.

<sup>63</sup> *Id.*

<sup>64</sup> *See Text of Ruling by Judge in Ellsberg Case*, N.Y. TIMES, May 12, 1973, at 14.

<sup>65</sup> *The Plumbers*, N.Y. TIMES MAG., July 22, 1973, at 197.

<sup>66</sup> *Id.*

<sup>67</sup> *See* Martin Arnold, *Ellsberg Lawyers Weigh New Motion for Dismissal*, N.Y. TIMES, Apr. 30, 1973, at 1.

<sup>68</sup> *See Guilty: The Government*, N.Y. TIMES, May 12, 1973, at 32.

<sup>69</sup> Brief for Robert C. Mardian at 4 [hereinafter MARDIAN’S BRIEF], *United States v. Mardian*, 546 F.2d 973 (D.C. Cir. 1976).

<sup>70</sup> Brief for the United States at 256 n.342 [hereinafter GOV’T BRIEF], *United States v. Haldeman*, 559 F.2d 31 (D.C. Cir. 1977) (No. 75-1381).

<sup>71</sup> *See* Seymour M. Hersh, *Prosecutors Feel Motive in Cover-Up Was Wish to Hide Ellsberg Burglary*, N.Y. TIMES, Mar. 3, 1974, at 41.

psychiatrist break-in had also participated in the Watergate break-in, most prominently Gordon Liddy and Howard Hunt.<sup>72</sup> Moreover, the Ellsberg break-in conspiracy evidence explained Hunt's threats after his Watergate burglary arrest and conviction to expose the "seamy things" he had done for the White House if his money demands were not met.<sup>73</sup>

#### B. The Watergate Break-In Conspiracy

The Committee to Re-elect the President (CRP) was organized to run Richard Nixon's re-election campaign.<sup>74</sup> It was understood that John Mitchell would leave the post of Attorney General to become the head of CRP, but until that time, the nominal head of CRP was Jeb Magruder.<sup>75</sup> In November of 1971, Mitchell, still Attorney General, along with John Dean, who was Counsel to the President, interviewed Gordon Liddy for a position at CRP.<sup>76</sup> Liddy had been recommended to Dean by Egil Krogh,<sup>77</sup> who was in charge of the "Plumbers" and supervised by Ehrlichman.<sup>78</sup> During the interview, there was discussion of CRP's intelligence needs.<sup>79</sup> After being hired, Liddy, along with Howard Hunt, began developing a political espionage plan.<sup>80</sup> At a meeting in January of 1972, Liddy presented to Mitchell, Dean and Magruder a plan he called "Gemstone."<sup>81</sup> This \$1,000,000 plan included burglaries, electronic surveillance, kidnapping, and prostitutes.<sup>82</sup> Mitchell rejected the plan as not "quite what [he] had in mind."<sup>83</sup> About one week later, Mitchell, Magruder, Dean and Liddy met again in Mitchell's office.<sup>84</sup> The new plan's budget was now \$500,000.<sup>85</sup> The revised plan still included burglaries and wiretaps.<sup>86</sup> Mitchell refused to give approval to this scaled-down plan on the basis that it was still too costly.<sup>87</sup> Dean commented at this meeting that the Attorney General's office was not the place that such plans should be discussed, and suggested that Magruder be Liddy's point person to provide cover for Mitchell.<sup>88</sup>

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<sup>72</sup> See Bob Woodward & Carl Bernstein, *Break-In Memo Sent to Ehrlichman*, WASH. POST, June 13, 1973, at A1.

<sup>73</sup> See *Transcript of Nixon Talks of March 21, 1973*, WASH. POST, May 1, 1974, at A20; Walter Pincus, *Hearing Howard Hunt*, WASH. POST, Sept. 23, 1973, at C6.

<sup>74</sup> THEODORE H. WHITE, *BREACH OF FAITH: THE FALL OF RICHARD NIXON* 153 (1975).

<sup>75</sup> *Id.*

<sup>76</sup> Gov't Brief, *supra* note 70, at 11; Transcript of Record at 2627, 7675, *United States v. John N. Mitchell, et al.*, Criminal No. 74-110 (D.D.C 1975) (on file with author) [hereinafter Transcript].

<sup>77</sup> Gov't Brief, *supra* note 70, at 11 n.8; Transcript at 7654-56.

<sup>78</sup> *Id.* at 11 n.8.

<sup>79</sup> *Id.* at 12; Transcript at 4117-20.

<sup>80</sup> Gov't Brief, *supra* note 70, at 12.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*; Transcript at 2628-31.

<sup>84</sup> Gov't Brief, *supra* note 70, at 12.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*; Transcript at 2632-34.



Dean reported what occurred at this meeting to Haldeman.<sup>89</sup> Both Dean and Haldeman agreed that the White House should not be involved with CRP's illegal intelligence plans.<sup>90</sup> However, Gordon Strachan, who was Haldeman's assistant, was kept informed by Magruder of Liddy's plans.<sup>91</sup> When Mitchell, on March 30, 1972, approved a budget of \$250,000 for Liddy, Magruder informed Strachan of Mitchell's approval.<sup>92</sup> Thereafter, Liddy began receiving money from CRP to implement his plan.<sup>93</sup>

On Memorial Day weekend, a team of burglars directed by Liddy and Hunt broke into the Democratic National Committee (DNC) headquarters in the Watergate office complex.<sup>94</sup> The burglars photographed some documents and installed wiretaps on telephones.<sup>95</sup> A couple of weeks later, Magruder showed Mitchell some of the photographs and information from the wiretaps.<sup>96</sup> Mitchell expressed dissatisfaction, and Magruder conveyed Mitchell's reaction to Liddy.<sup>97</sup> Liddy explained to Magruder that the listening devices were not working properly, but that this would be fixed.<sup>98</sup> Liddy and Hunt then organized a second break-in of the DNC offices.<sup>99</sup> This second break-in occurred on June 17, 1972.<sup>100</sup> This break-in led to the arrest of not only Hunt and Liddy, but also James McCord, who was employed as security director at CRP, as well as other men, including Eugenio Martinez and Bernard Barker, who had participated in the break-in of Dr. Fielding's office.<sup>101</sup> Hunt, Barker and three of the burglars pled guilty to the burglary of the DNC offices.<sup>102</sup> McCord and Liddy pled not guilty, but were convicted at trial.<sup>103</sup> Neither testified.<sup>104</sup> Shortly before the sentencing of all of those guilty in the DNC Watergate office burglary, McCord sent a letter to Judge Sirica stating that there had been pressure exerted upon him and the others to remain silent.<sup>105</sup>

The prosecution presented the evidence of the planning and execution of the burglaries at the DNC offices at Watergate to establish motive for the conspiracy charged in Count I of the Indictment against Mitchell,

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<sup>89</sup> *Haldeman*, 559 F.2d at 53.

<sup>90</sup> Gov't Brief, *supra* note 70, at 12; Transcript at 2635–36.

<sup>91</sup> *Haldeman*, 559 F.2d at 53.

<sup>92</sup> *Id.* at 52.

<sup>93</sup> Gov't Brief, *supra* note 70, at 13; Transcript at 3276–77.

<sup>94</sup> Gov't Brief, *supra* note 70, at 13; Transcript at 4139–44.

<sup>95</sup> Gov't Brief, *supra* note 70, at 13.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 13–14.

<sup>98</sup> *Id.* at 14.

<sup>99</sup> *Id.*

<sup>100</sup> *United States v. Haldeman*, 559 F.2d 31, 52 (D.C. Cir. 1977).

<sup>101</sup> *Id.* at 52 n.9. The other two men arrested inside the DNC offices were Frank Sturgis and Virgilio Gonzales. *Id.*

<sup>102</sup> CONG. QUARTERLY, WATERGATE: CHRONOLOGY OF A CRISIS 10 (Wayne Kelley ed., 1975).

<sup>103</sup> *Id.*

<sup>104</sup> Gov't Brief, *supra* note 70, at 32.

<sup>105</sup> CONG. QUARTERLY, *supra* note 102, at 10.

Ehrlichman, Haldeman and Mardian. Although it appears it would have been possible for Mitchell and perhaps Haldeman to have been charged with conspiracy to burglarize the DNC offices, none of the defendants at the Watergate conspiracy trial were charged with conspiracy relating to the actual break-ins of the DNC offices in May and June of 1972.

### C. The Cover-Up Conspiracy

Once it became known that McCord had been arrested along with others at the DNC offices at Watergate, various acts were committed in order to cover up the fact that CRP and White House officials had planned and organized the break-in.<sup>106</sup> The prosecution's evidence covered a wide range of conspiratorial acts.<sup>107</sup>

Shortly after learning of McCord's arrest, Mitchell, Mardian, Magruder and Fred LaRue, another CRP official, arranged for Liddy to seek Attorney General Richard Kleindienst's aid in getting McCord released from jail.<sup>108</sup> Mitchell, Mardian, Magruder and LaRue also participated in the issuance of a press release, approved by Haldeman, that denied that McCord's involvement with the DNC break-in was related to his employment at CRP.<sup>109</sup>

In order to further disassociate any connection with those arrested at the DNC offices at Watergate with CRP or the White House, Magruder destroyed all papers relating to Liddy's Gemstone plan.<sup>110</sup> The prosecution introduced evidence that implicated Mitchell, Mardian, LaRue, Dean, and Strachan in this. Strachan also reported to Dean and Haldeman that he had destroyed DNC wiretap reports and Watergate-related memos that he had kept in his files. Additionally, Dean met with Ehrlichman and Charles Colson, Special Counsel to the President, and they discussed having Hunt leave the country.<sup>111</sup> When Colson disclosed that Hunt had a safe in the Executive Office Building that might contain embarrassing information, Ehrlichman instructed Dean to have the safe opened and have its contents removed.<sup>112</sup>

Evidence was presented about attempts to thwart the FBI investigation into the Watergate break-in.<sup>113</sup> Dean, Haldeman, Ehrlichman, and Mardian were implicated in trying to get the CIA to take responsibility for the break-in.<sup>114</sup> They also tracked the FBI investigation into the DNC burglary to

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<sup>106</sup> *United States v. Haldeman*, 559 F.2d 31, 53–54 (D.C. Cir. 1977).

<sup>107</sup> CONG. QUARTERLY, *supra* note 102, at 9.

<sup>108</sup> *United States v. Mardian*, 546 F.2d 973, 975 (D.C. Cir. 1976).

<sup>109</sup> *Id.*

<sup>110</sup> *Haldeman*, 559 F.2d at 53–54.

<sup>111</sup> CONG. QUARTERLY, *supra* note 102, at 112.

<sup>112</sup> *Haldeman*, 559 F.2d at 54.

<sup>113</sup> CONG. QUARTERLY, *supra* note 102, at 820.

<sup>114</sup> *See id.* at 66.

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determine if the FBI had any information tying the burglary to CRP or the White House.<sup>115</sup>

Once it became clear that Liddy would be identified as the leader of the burglary team, the conspirators developed various cover stories to explain why approximately \$199,000 in CRP funds had been given to him.<sup>116</sup> Such cover stories included that the money had been earmarked for security at the upcoming Republican convention and for security for surrogate speakers.<sup>117</sup> Magruder rehearsed with Dean and Mitchell the false cover story he intended to give to the grand jury investigating the Watergate burglary.<sup>118</sup> False information was also given to the FBI and the grand jury by Mitchell and Ehrlichman.<sup>119</sup>

The cover-up also included the payment of hush money to those guilty of the Watergate burglary.<sup>120</sup> The persons involved with the hush money payments included Herbert Kalmbach and Anthony Ulasewicz.<sup>121</sup> As well as payments of cash to the burglars, there were suggestions from the White House of presidential clemency for the burglars.<sup>122</sup>

The efforts to keep the burglars quiet and not implicate anyone at CRP or the White House appeared to be successful. Nixon had won a landslide re-election in November 1972.<sup>123</sup> During the early winter of 1973, Hunt had pleaded guilty, as had four of the burglars.<sup>124</sup> Although McCord and Liddy pleaded not guilty and went to trial, neither testified.<sup>125</sup> None of those involved in the burglary tied it to CRP or the White House.<sup>126</sup> But inside the White House, Nixon, Haldeman, Ehrlichman and Dean were especially concerned about Hunt.<sup>127</sup> Hunt's demands for money continued after his guilty plea.<sup>128</sup> Things changed, however, on March 19, 1973, the day of sentencing for those guilty of the Watergate break-in, when McCord wrote a letter to Judge Sirica revealing that the burglars had been forced to

<sup>115</sup> CONG. QUARTERLY, *supra* note 102, at 812.

<sup>116</sup> *Haldeman*, 559 F.2d at 54.

<sup>117</sup> Gov't Brief, *supra* note 70, at 22.

<sup>118</sup> *Id.* at 23.

<sup>119</sup> *Haldeman*, 559 F.2d at 59.

<sup>120</sup> *Id.* at 55–57.

<sup>121</sup> Gov't Brief, *supra* note 70, at 26 n.33.

<sup>122</sup> *Haldeman*, 559 F.2d at 56–57.

<sup>123</sup> David S. Broder, *Nixon Wins Landslide Victory; Democrats Hold Senate, House*, WASH. POST, Nov. 8, 1972, available at <http://www.washingtonpost.com/wp-dyn/content/article/2002/06/03/AR2005111001233.html>.

<sup>124</sup> CONG. QUARTERLY, *supra* note 102, at 10.

<sup>125</sup> Gov't Brief, *supra* note 70, at 32.

<sup>126</sup> See *The Watergate Files*, GERALD R. FORD LIBRARY & MUSEUM, [http://www.ford.utexas.edu/museum/exhibits/watergate\\_files/content.php?section=1&page=d](http://www.ford.utexas.edu/museum/exhibits/watergate_files/content.php?section=1&page=d) (last visited Mar. 22, 2012).

<sup>127</sup> *Haldeman*, 559 F.2d at 59.

<sup>128</sup> See *id.* at 57 (explaining that Hunt decided to plead guilty and then demanded \$122,000 “to settle his financial affairs before sentencing”).

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remain silent, that perjury had been committed, and that others were involved in the break-in.<sup>129</sup>

#### D. The White House Conspiracy

McCord's letter led to significant developments. Within a month of the letter, Dean began cooperating with the prosecutors.<sup>130</sup> Shortly thereafter, Magruder and LaRue met with the prosecutors.<sup>131</sup> Most of the evidence presented at the Watergate conspiracy trial covering events after McCord's March 1973 letter focused on how Haldeman, Ehrlichman, and Nixon sought to justify their actions in the pre-McCord letter period.<sup>132</sup> Much of this evidence was presented through the White House tapes.<sup>133</sup> Nixon told Ehrlichman that everyone should "have a straight damn line[:] . . . we raised money for a purpose that we thought was perfectly proper."<sup>134</sup> There were discussions in the White House to have Dean, Mitchell and Magruder take all the blame in return for clemency.<sup>135</sup> It was thought at one point by those within the White House that no investigation was likely of what happened after June 17, 1972 (the date of the break-in) if Mitchell would step forward and admit his guilt for what happened before June 17.<sup>136</sup> Mitchell, however, was unwilling to take the blame.<sup>137</sup>

Dean was also seen as a possible scapegoat. On one White House tape, Nixon told Ehrlichman and Haldeman that Dean should be told to "look down the road . . . that there's only one man that could restore him to the ability to practice law."<sup>138</sup> After Dean refused Ehrlichman's invitation to meet, Nixon, Haldeman and Ehrlichman discussed a plan where the "scenario" would be that when Dean failed to write a report on Watergate as requested by Nixon, Nixon became suspicious and assigned Ehrlichman to conduct an investigation, and Ehrlichman's investigation revealed that Dean was the main culprit.<sup>139</sup> On the White House tapes, there was discussion of the need "to put the wagons up around the President."<sup>140</sup> False testimony by Haldeman and Ehrlichman was part of this conspiracy. Haldeman testified falsely before the Senate Select Committee about Nixon's response to raising \$1,000,000 for the burglars—Haldeman

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<sup>129</sup> *Id.* at 58.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *United States v. Mardian*, 546 F.2d 973, 978 (D.C. Cir. 1976).

<sup>134</sup> *Haldeman*, 559 F.2d at 59 n.25.

<sup>135</sup> *Id.* at 57.

<sup>136</sup> *See id.* at 58.

<sup>137</sup> *Id.*

<sup>138</sup> Gov't Brief, *supra* note 70, at 38.

<sup>139</sup> *See Haldeman*, 559 F.2d at 58, 59; Audio Tape: Transcript of a Recording of a Meeting Between the President, H.R. Haldeman, and John Ehrlichman in the Oval Office, (April 16, 1973, at 10:50 to 11:04 A.M.) (available online at <http://www.lib.berkeley.edu/MRC/watergate.html>).

<sup>140</sup> Gov't Brief, *supra* note 70, at 39.

testified that Nixon stated “it would be wrong”—and Ehrlichman testified falsely before the grand jury about his knowledge of the payment of hush money.<sup>141</sup>

#### E. The Conspiracy in the Indictment

Count One of the Indictment charged all defendants with conspiracy to obstruct justice, make false statements to a government agency, commit perjury, make false declarations, and defraud the Central Intelligence Agency, the Federal Bureau of Investigation, and the Department of Justice, in connection with the federal investigation of the Watergate break-in and related matters in connection with the trial of the Watergate burglars.<sup>142</sup> In paragraph eleven of the Indictment, the purpose of the conspiracy was stated as “concealing and causing to be concealed the identities of the persons who were responsible for, participated in, and had knowledge of (a) the activities which were the subject of the investigation and trial [of the Watergate burglaries], and (b) other illegal and improper activities.”<sup>143</sup> The “investigation” set forth in paragraph eleven was described in paragraph three as the investigation that began “on or about June 17, 1972” to determine whether crimes “had been committed” and to “identify” those who “had committed, caused the commission of, and conspired to commit such violations.”<sup>144</sup> Additionally, paragraph one of the Indictment described the arrest of the Watergate burglars on June 17, 1972, and paragraph four referenced the indictment of the Watergate burglars.<sup>145</sup>

The Indictment in paragraph sixteen listed forty-five overt acts in chronological order, beginning with Mitchell’s request to Mardian on June 17, 1972 to tell Liddy to seek the help of Attorney General Kleindienst in obtaining the release of one or more of the burglars arrested at the DNC offices at Watergate, and ending with Ehrlichman telling Egil Krogh on March 22, 1973 that Ehrlichman did not believe that Hunt would reveal the burglary of Ellsberg’s psychiatrist.<sup>146</sup> All of the overt acts of the conspiracy charged in the indictment occurred during the period of what I have labeled the “Cover-Up Conspiracy.”<sup>147</sup> The majority of the overt acts concerned the payment of hush money to the burglars during this timeframe.<sup>148</sup> As discussed above, the evidence presented at the trial

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<sup>141</sup> *Haldeman*, 559 F.2d at 59.

<sup>142</sup> *Id.* at 120.

<sup>143</sup> *Id.*

<sup>144</sup> *Texts of the Indictments by Watergate Jury in Alleged Ellsberg Break-in Conspiracy*, N.Y. TIMES, Mar. 8, 1974, at 14.

<sup>145</sup> Indictment of John N. Mitchell, Harry R. Haldeman, John D. Ehrlichman, Charles Colson, Robert C. Mardian, Kenneth W. Parkinson, Gordon Strachan at 102–04 (1973) [hereinafter Indictment], available at <http://watergate.info/judiciary/APPII.PDF>.

<sup>146</sup> *Id.* at 109–17.

<sup>147</sup> See discussion *supra* Part II(C).

<sup>148</sup> Indictment, *supra* note 145, at 109–17.

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covered events outside the time frame of the conspiracy charged in the indictment.<sup>149</sup>

The government's position was that its case at the Watergate conspiracy trial established a single extensive conspiracy

to obstruct a federal grand jury investigation into the 1972 burglaries and bugging of the DNC headquarters in the Watergate building and related matters. This conspiracy began within hours after the arrest of the burglars on June 17, 1972. The conspiracy was prompted by two considerations: that the Watergate break-in had been approved by CRP officials and members of White House staff, and that two leaders of the Watergate burglary, Hunt and Liddy, had previously engaged in other unlawful activities for the White House, including the 1971 Ellsberg psychiatrist burglary. The conspirator's motivation was their desire to protect the Nixon administration.<sup>150</sup>

The government's position was also that "from its inception, the conspiracy necessarily included an agreement to conceal its existence and membership."<sup>151</sup>

### III. WAS WATERGATE A SINGLE CONSPIRACY OR MULTIPLE CONSPIRACIES?

As the previous discussion has outlined, the evidence at the Watergate trial could be viewed as proving four separate conspiracies, not the single conspiracy charged in the indictment. On the other hand, perhaps the evidence is better described as a single conspiracy. Earlier in this article, various approaches to the multiple conspiracy issue were discussed.<sup>152</sup> This section will discuss these different approaches to the evidence presented at the Watergate conspiracy trial.

It would appear that the evidence at the Watergate conspiracy trial did not demonstrate multiple conspiracies under the hub and spoke approach. Watergate did not emanate from one hub; no one person was at the center of the scandal. Various persons took leadership roles at different times. Although certain persons were more central to the conspiracy—for example, John Dean—and others clearly played only a minor role—for example, Fred LaRue—the minor figures cannot be viewed as mere spokes. Moreover, in a hub and spoke conspiracy, each of the conspiratorial spokes is usually acting independently of the others and is usually unaware of what other conspirators are doing.<sup>153</sup> Although in the Watergate conspiracy, each defendant was not aware of every move made by the other conspirators, there was awareness that the others were involved in similar

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<sup>149</sup> The first acts listed in the indictment occur in 1972; the evidence presented at the trial covered events beginning in 1971. See *The Plumbers*, *supra* note 65.

<sup>150</sup> Gov't Brief, *supra* note 70, at 47-48.

<sup>151</sup> *Id.* at 176.

<sup>152</sup> See discussion *supra* Part I.

<sup>153</sup> See discussion *supra* Part I(A).

conduct aimed at hiding the roles played by CRP and White House personnel in the DNC break-in.<sup>154</sup>

Compared to the hub and spoke conspiracy, the evidence presented at the Watergate trial fits better into the single conspiracy chain conspiracy. Watergate could be viewed as four conspiracies linked together. Even though there may have been no direct communication or contact among all of the conspirators, each played an important role in a conspiratorial scheme to obtain intelligence on political enemies, and to conceal that persons working for the Nixon White House and Nixon re-election campaign were involved in these illegal intelligence gathering acts.

The problem with the chain conspiracy analysis is that this chain conspiracy was not the conspiracy alleged in the indictment. The conspiracy of which defendants Mitchell, Ehrlichman, Haldeman and Mardian were charged clearly did not cover the Ellsberg psychiatrist office burglary or the DNC Watergate burglary.<sup>155</sup> The first overt act of the conspiracy charged in the indictment was just after the arrest of the Watergate burglars on June 17, 1972.<sup>156</sup> Moreover, the prosecution introduced evidence of the Ellsberg psychiatrist and DNC burglaries only to establish motive for the conspiracy actually charged in the indictment.<sup>157</sup> More problematic is the evidence relating to events after Dean and others began cooperating with the prosecution. These events, especially the words of Nixon, Haldeman, and Ehrlichman caught on tape, were not aimed at hiding the identities of those responsible for the earlier burglaries, but rather to get others to take the blame for those burglaries, and thus protect the three men within the inner circle of the White House.<sup>158</sup> Therefore, although the Watergate conspiracy is better viewed as a chain conspiracy compared to a hub and spoke conspiracy, the chain conspiracy approach is not an accurate description of the conspiracy charged in the indictment.

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<sup>154</sup> See *United States v. Haldeman*, 559 F.2d 31, 55, 98 (D.C. Cir. 1976).

<sup>155</sup> Indictment, *supra* note 145, at 109; *Brief Timeline of Events*, WATERGATE.INFO, <http://watergate.info/chronology/brief.shtml> (last visited Mar. 23, 2012).

<sup>156</sup> Indictment, *supra* note 145, at 109.

<sup>157</sup> See *Haldeman*, 559 F.2d at 88 (“Objection was made to the introduction of evidence of the Ellsberg break-in on the grounds that the prejudice engendered by the admission into evidence of such prior acts of criminal misconduct outweighed their legitimate probative value. Ehrlichman br. at 45-53a; Haldeman br. at 4. Rejecting this objection, the court admitted the evidence as being probative of motive.”).

<sup>158</sup> See *id.* at 58 (“Nixon, Dean, Mitchell, Haldeman, and Ehrlichman then took up a discussion that had begun the day before: the best strategy for dealing with the upcoming Senate hearings. Despite the previous day's plans, no one had the fortitude to suggest directly to Mitchell that he take the full blame and go to jail to save the Nixon presidency. Lacking that alternative, they all focused on a plan Nixon had discussed with Dean on March 17 indeed, it had been mentioned as an option for several months. Dean would make a report to the President. It would be quite general and would indicate that no one from the White House was involved.”).

If we focus on the *agreement* among the conspirators to determine whether the Watergate conspiracy was a single conspiracy or multiple conspiracies, the multiple conspiracy conclusion appears more accurate. There were clearly four separate agreements: (1) an agreement to gather information on Ellsberg by illegally obtaining his mental health records in order to discredit him and hopefully discredit the Pentagon Papers; (2) an agreement to gather information about Democratic Party officials and candidates by illegally obtaining information in order to gain some political advantage (although the exact reason for the Watergate burglary is still subject to debate); (3) an agreement to conceal that persons who worked at CRP and the White House had authorized the break-in; and (4) an agreement to blame persons already identified to the prosecution by Dean as solely responsible for the Watergate burglary and subsequent cover-up, and to absolve Nixon, Haldeman, and Ehrlichman. It appears that none of the four defendants convicted at the Watergate conspiracy trial, except for perhaps Haldeman, were participants in all four agreements. The evidence seems to support that Mitchell was not part of any agreement to burglarize Ellsberg's psychiatrist office, and not part of any agreement for him to take the blame for the Watergate burglary.<sup>159</sup> Ehrlichman was not part of any agreement to burglarize the DNC offices.<sup>160</sup> Most significantly, Robert Mardian was clearly not a party to any agreement involving Ellsberg, the actual Watergate break-in, or an agreement to protect White House personnel and to place blame on those outside the White House, including himself.<sup>161</sup> Application of the "agreement" approach to multiple conspiracies seems to provide the strongest support for the conclusion that the evidence at the Watergate trial established multiple conspiracies contrary to the single conspiracy charged in the indictment.

Whether the "common goal or purpose" approach leads to a multiple conspiracy conclusion depends on how broadly we define the goal and purpose of the conspirators. On the one hand, the purpose of all the criminal conduct introduced at the Watergate trial could be viewed as supporting and protecting the presidency of Richard Nixon. The conspirator's goal was to help Nixon exercise power, be re-elected, and avoid impeachment. Although the precise goals may have shifted during the full conspiratorial period, and not every conspirator was involved in all

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<sup>159</sup> See *id.* at 89.

<sup>160</sup> Indictment, *supra* note 145, at 104 ("On or about September 15, 1972, in connection with the said investigation, the Grand Jury returned an indictment in Criminal Case No. 1827-72 in the United States District Court for the District of Columbia charging Bernard L. Barker, Virgilio R. Gonzalez, E. Howard Hunt, Jr., G. Gordon Liddy, Eugenio R. Martinez, James W. McCord, Jr., and Frank L. Sturgis with conspiracy, burglary and unlawful endeavor to intercept wire communications.").

<sup>161</sup> See *Haldeman*, 559 F.2d at 53 ("[I]n an apparent effort to avoid the appearance of any link between CRP and the burglars, Mitchell, Mardian, LaRue, and Magruder met and decided to contact the new Attorney General, Richard Kleindienst, urging him to have McCord released from jail before the police penetrated his alias. . . . Aware that McCord's true identity would come to light, Mardian, Magruder, and LaRue the next day worked on a press release that would deny any CRP tie to the break-in.").



phases of the conspiracy, it could be argued that there was a common goal of all the conspirators, and thus a single conspiracy. On the other hand, this goal may be too broad. All of the overt acts set forth in the indictment concerned only the goal of preventing disclosure that CRP and White House personnel had planned and organized the DNC burglary. This goal was thoroughly defeated in April 1973 when Dean and others began cooperating with the prosecution.<sup>162</sup> The goal of the next conspiracy, as stated by chief special prosecutor James Neal, was to “put it all on Mr. Mitchell, Mr. Magruder, and it also ropes in Mardian, LaRue, attorneys O’Brien, Parkinson and so forth . . . . In other words, everybody except that tight circle now within the wagons.”<sup>163</sup> Additionally, the goal of the Ellsberg psychiatrist burglary was limited to discrediting Ellsberg, not gathering information for Nixon’s re-election campaign. The common goal or purpose approach to conspiracies, like the agreement approach, seems to lend more support to the view that the evidence at the Watergate trial proved multiple conspiracies, although a broad application of the common goal or purpose approach could lead to a single conspiracy conclusion.

#### IV. PREJUDICE

The possible conclusion that the evidence at the Watergate trial proved multiple conspiracies as opposed to the single conspiracy charged in the indictment does not mean that any defendant’s conviction should have been reversed. The case law is very clear that proof of multiple conspiracies is harmless error unless prejudice can be proven.<sup>164</sup> Substantial prejudice from multiple conspiracies can be proven in several ways. For example, if proof at trial differed so greatly from the indictment, prejudice can be based on unfair surprise and inability to prepare an adequate defense.<sup>165</sup> A more typical prejudice claim is based on spillover. Evidence of multiple conspiracies can confuse jurors who may transfer proof of one of the conspiracies to a defendant involved in a different conspiracy.<sup>166</sup> Although some courts have stated that the risk of spillover prejudice is less likely the fewer the defendants,<sup>167</sup> courts have found prejudicial spillover even when there were only three defendants.<sup>168</sup> Another factor in evaluating spillover prejudice is the disparity in evidence against different defendants. The greater the disparity, the more likely spillover is prejudicial.<sup>169</sup>

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<sup>162</sup> *Haldeman*, 559 F.2d at 58.

<sup>163</sup> Mardian’s Brief, *supra* note 69, at 63–64; Transcript at 9823.

<sup>164</sup> *Kotteakos v. United States*, 328 U.S. 750, 757 (1946); *Berger v. United States*, 295 U.S. 78, 82 (1935); *United States v. Portela*, 167 F.3d 687, 706 (1st Cir.), *cert. denied*, 528 U.S. 917 (1999).

<sup>165</sup> *United States v. Richardson*, 532 F.3d 1279, 1287 (11th Cir. 2008), *cert. denied*, 555 U.S. 1120 (2009).

<sup>166</sup> *United States v. Kemp*, 500 F.3d 257, 291 (3d Cir. 2007), *cert. denied*, 552 U.S. 1223 (2008).

<sup>167</sup> *See, e.g., United States v. Mathis*, 216 F.3d 18, 25 (D.C. Cir.), *cert. denied*, 531 U.S. 972 (2000).

<sup>168</sup> *See, e.g., United States v. McDermott*, 245 F.3d 133, 139 (2d Cir. 2001).

<sup>169</sup> *Id.*

Additionally, courts have emphasized that prejudice exists if the jury transfers guilt from one defendant to another.<sup>170</sup> Although courts have recognized that proper jury instructions can diminish the likelihood of prejudice, there are cases where the prejudicial spillover was so overwhelming, limiting instructions were not adequate to eliminate prejudice.<sup>171</sup> Perhaps the most significant prejudice argument involves the improper admission of hearsay statements under the co-conspirator exception. If all defendants are co-conspirators in a single conspiracy, the hearsay statements of any one defendant are admissible against every other defendant.<sup>172</sup> In a multiple conspiracy situation, the statements of members of one conspiracy would not be properly admitted against defendants who were members of a separate conspiracy.<sup>173</sup> On the other hand, even if the trial evidence established multiple conspiracies when the indictment alleged a single conspiracy, no prejudice exists if a defendant participated in the separate conspiracies.<sup>174</sup> Moreover, proof of multiple conspiracies is not prejudicial when the evidence of conspiracies not charged in the indictment pertains to a chain of events explaining the context, motive, or set-up of the conspiracy charged.<sup>175</sup> It is not prejudicial to admit evidence of other conspiracies linked in time and circumstances to the charged conspiracy.<sup>176</sup> Nor is it prejudicial to present to the jury evidence of other conspiracies that are an “integral and a natural part” of the charged conspiracy, or necessary to “complete the story” of the charged conspiracy.<sup>177</sup>

It would seem that the only defendant convicted at the Watergate conspiracy trial who might have been prejudiced by the proof of multiple conspiracies was Robert Mardian. It is very doubtful that there was substantial prejudice to Mitchell, Haldeman, or Ehrlichman.

First, Mardian was the only convicted defendant who was not a member of more than one of the multiple conspiracies. As discussed earlier in this article, Ehrlichman was a member of the Ellsberg Conspiracy, the Cover-Up Conspiracy, and the White House Conspiracy.<sup>178</sup> Mitchell was a member of the Break-In Conspiracy and the Cover-Up Conspiracy. Haldeman, at the least, was a member of the Cover-Up Conspiracy and White House Conspiracy, and possibly the Ellsberg Conspiracy and Break-In Conspiracy. Therefore, the evidence pertaining to the Ellsberg Conspiracy and Break-In Conspiracy could easily be viewed

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<sup>170</sup> *Richardson*, 532 F.3d at 1279; *Kemp*, 500 F.3d at 291; *Portela*, 167 F.3d at 700.

<sup>171</sup> *See, e.g., McDermott*, 245 F.3d at 139–40.

<sup>172</sup> *Portela*, 167 F.3d at 702.

<sup>173</sup> *Kotteakos v. United States*, 328 U.S. 750, 757 (1946).

<sup>174</sup> *United States v. Mangual-Santiago*, 562 F.3d 411, 423 (1st Cir.), *cert. denied*, 130 S. Ct. 293 (2009).

<sup>175</sup> *Richardson*, 532 F.3d at 1287.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *See supra* Part II(A)–(C).

as providing the motive, context, and background for the participation of Ehrlichman, Haldeman, and Mitchell in the Cover-Up Conspiracy charged in the indictment. Mardian, however, was not part of any conspiracy other than the Cover-Up Conspiracy.

Secondly, there was a large disparity in the evidence against Mardian compared to the other three convicted defendants. In over 1600 pages of transcript of the direct and redirect testimony of government witnesses (excluding discussions with the court or between counsel), and 670 pages of White House tapes transcript, Mardian's name appeared on 106 pages, less than five percent of the transcript pages.<sup>179</sup> The evidence against Ehrlichman, Haldeman, and Mitchell was overwhelming and greatly exceeded the evidence against Mardian. This disparity in evidence lends support that Mardian was prejudiced by the evidence of multiple conspiracies.

Most significant to Mardian's prejudice argument is the introduction of the White House tapes into evidence at the Watergate Conspiracy trial. These tapes were admitted under the co-conspirator exception to hearsay.<sup>180</sup> If, however, the taped statements were made as part of a conspiracy different than the one with which Mardian was a member, these taped statements would be inadmissible against Mardian. This would also be viewed as establishing prejudice from the proof of multiple conspiracies.

The White House tapes played for the jury at the Watergate conspiracy trial included five references to Mardian.<sup>181</sup> All five references occurred during conversations on April 14 and 15, 1973, in which Ehrlichman was reporting to Nixon what he had learned about Watergate during his interviews with several persons during the previous ten days.<sup>182</sup> This was the time period of the "White House Conspiracy" during which Nixon, Haldeman, and Ehrlichman were conspiring to place all the blame on Dean and CRP officials such as Mitchell, Magruder, Mardian, and LaRue—everybody except that "tight circle now within the wagons."<sup>183</sup> These tapes of White House conversations were admitted against Mardian based on the prosecution's position that statements among Ehrlichman, Nixon, and Haldeman were in furtherance of the single conspiracy in the indictment of which all four defendants were charged.<sup>184</sup> To the extent that the White House Conspiracy, however, was a different conspiracy than the one alleged in the indictment, statements as part of and in furtherance of the White House Conspiracy would not be part of or in furtherance of the conspiracy of which Mardian was charged.

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<sup>179</sup> Mardian's Brief, *supra* note 69, at 102.

<sup>180</sup> United States v. Haldeman, 559 F.2d 31, 110 (D.C. Cir. 1976).

<sup>181</sup> United States v. Mardian, 546 F.2d 973, 978 (D.C. Cir. 1976).

<sup>182</sup> Mardian's Brief, *supra* note 69, at 63.

<sup>183</sup> *Id.* at 63–64; Transcript at 9823.

<sup>184</sup> *Mardian*, 546 F.2d at 978.

The prejudice to Mardian by the statements on the White House tapes is clear. In a conversation on April 14, 1973, Ehrlichman told Nixon and Haldeman that he had a “bit of incidental intelligence” that Mardian had developed an “elaborate cover story which he fed to *The New York Times*, which lay it all back in the White House.”<sup>185</sup> In a conversation later that same day, Ehrlichman told Nixon that he had heard that the “U.S. Attorney is hot after” Colson, Mitchell, Mardian, and Magruder.<sup>186</sup> In another April 14, 1973 conversation, Ehrlichman, in discussing Dean’s involvement, told Nixon and Haldeman that “Mardian and LaRue would say to Mitchell, ‘Mitch, you’ve got to do something about this,’ and Mitchell’s stock answer was to turn to John Dean.”<sup>187</sup> On April 15, 1973, Ehrlichman told Nixon that “there was a cover story which Mardian and others cooked up.”<sup>188</sup> Another White House tape had Nixon telling Ehrlichman that Mardian, LaRue, Kalmbach, and Dean “gotta have a straight damn line that, of course we raised money. Be very honest about it. But, uh, we raised money for a purpose we thought was perfectly proper.”<sup>189</sup>

Mardian had never spoken with Nixon, Haldeman, or Ehrlichman about any Watergate-related matter.<sup>190</sup> These taped conversations were made after McCord had sent his letter to Judge Sirica, after Dean and others had begun cooperating with the prosecution, and nine months after Mardian had ceased being involved in any Watergate-related activities. These White House taped conversations therefore could properly be viewed as not during the course of or in furtherance of the Watergate Cover-up Conspiracy alleged in the indictment of which Mardian was charged. Mardian therefore would seem to have been prejudiced by the evidence of multiple conspiracies.

#### CONCLUSION

On appeal of his Watergate conspiracy conviction, Mardian raised several issues, including arguments dealing with multiple conspiracies and with the White House tapes.<sup>191</sup> The Court of Appeals for the District of Columbia sitting en banc unanimously reversed Mardian’s conviction

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<sup>185</sup> Audio Tape: Transcript of a Recording of a Meeting Among The President, H.R. Haldeman and John Erlichman in the Executive Office Building (Apr. 14, 1973, at 8:55 to 11:31 A.M.) [hereinafter Recording in the Executive Office Building], available at [http://www.nixonlibrary.gov/forresearches/find/tapes/watergate/trial/exhibit\\_18.pdf](http://www.nixonlibrary.gov/forresearches/find/tapes/watergate/trial/exhibit_18.pdf).

<sup>186</sup> Audio Tape: Transcript of a Recording of a Meeting Among the President, H.R. Haldeman, and John Erlichman, the EOB (Apr.14, 1973, at 5:15 to 6:45 P.M.) available at [http://www.nixonlibrary.gov/forresearches/find/tapes/watergate/trial/exhibit\\_20.pdf](http://www.nixonlibrary.gov/forresearches/find/tapes/watergate/trial/exhibit_20.pdf).

<sup>187</sup> Recording in the Executive Office Building.

<sup>188</sup> Audio Tape: Transcript of a Recording of a Meeting Between the President and John Erlichman, (April 15, 1973, at 10:35 to 11:15 A.M.), available at [http://www.nixonlibrary.gov/forresearches/find/tapes/watergate/trial/exhibit\\_23.pdf](http://www.nixonlibrary.gov/forresearches/find/tapes/watergate/trial/exhibit_23.pdf).

<sup>189</sup> Audio Tape: Transcript of a Recording of a Telephone Conversation Between the President and John Erlichman, (Apr. 14, 1973, at 11:22 to 11:53 P.M.), available at <http://nixon.archives.gov/forresearchers/find/tapes/watergate/trial/transcripts.php>.

<sup>190</sup> *United States v. Mardian*, 546 F.2d 973, 978 (D.C. Cir. 1976).

<sup>191</sup> *Id.* at 977–78.

based on severance.<sup>192</sup> The court's opinion was most influenced by the fact that two weeks after the trial had started, Mardian's lead counsel, David Bress, had become very ill and was forced to leave the trial.<sup>193</sup> A motion for severance was filed, but denied by Judge Sirica.<sup>194</sup> The Court of Appeals held that "Mardian's interest in being represented by counsel of his own choice, combined with the disproportion of the evidence to his potential prejudice, necessitated severance. On this ground, we reverse and remand for a new trial."<sup>195</sup> The Court did not directly address the admissibility of the White House Tapes.<sup>196</sup> It did note,

Moreover, tape recordings of conversations between conspirators played an undeniably important role in the prosecution's case. Twenty-four of the 30 tapes the prosecution played presented conversations that occurred during March and April of 1973, further underscoring the significance of that time period. Mardian was not a participant in any of the 30 taped conversations. His name was mentioned five times on the tapes played to the jury. He challenged in timely fashion each of the references as inadmissible and moved to have them deleted, supporting his motion with a lengthy memorandum of points and authorities. The court did delete a few references, but the five challenged here remained.<sup>197</sup>

The court continued in a footnote:

In light of our disposition of the case, we need not determine the admissibility of these references since the question, if it arises on retrial, will appear in a vastly different setting. Even if some references are technically admissible under various exceptions to the hearsay rule, the court is still called upon to exclude evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Rule 403, Fed. R. Evid. When Mardian is retried singly, the major focus will be on the period of June and July of 1972. Without the need to introduce evidence against other defendants, the balance between relevance and prejudice of statements made in March and April of 1973 may be substantially altered.<sup>198</sup>

The court's opinion did not address the multiple conspiracy argument.<sup>199</sup> A few months after Mardian's conviction was reversed, a decision was made by special prosecutor Charles Ruff to drop all charges against Mardian.<sup>200</sup>

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<sup>192</sup> *Id.* at 981.

<sup>193</sup> *Id.* at 979.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 981.

<sup>196</sup> *See id.* at 979–80.

<sup>197</sup> *Id.* at 978.

<sup>198</sup> *Id.* at 978 n.6.

<sup>199</sup> *See generally id.*

<sup>200</sup> Joyce Jensen, *Mardian Charges Dropped*, N.Y. TIMES, Jan. 23, 1977, at E5.